STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of FRANCES WILLIAMS MESSER TRUST, DATED JANUARY 10, 1939.

OLD KENT BANK, Trustee,

Petitioner-Appellee/Cross-Appellant,

v

REMAINDER BENEFICIARIES,

Respondents-Appellants/Cross-Appellees.

UNPUBLISHED
May 29, 2001

No. 220177
Kent Probate Court
LC No. 92-153441-WT

Before: Wilder, P.J., and Hood and Cavanagh, JJ.

PER CURIAM.

Respondents, remainder beneficiaries, appeal as of right from a judgment entered by the probate court. Petitioner trustee cross appeals from the portion of the judgment limiting recovery of costs and expenses incurred defending this action. We reverse.

In *In re Messer Trust*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 1996 (Docket No. 174624), we concluded that a remand for a new trial was warranted regarding the issue of reasonable prudence in administering trust assets. On appeal from this court's decision, the Supreme Court held that the remainder beneficiaries were entitled to a "jury trial on all factual issues except the issue of the trustee's prudence, because that determination is properly left to the probate court." *In re Messer Trust*, 457 Mich 371, 373; 579 NW2d 73 (1998). At the probate level, petitioner filed a motion for entry of judgment that essentially requested a default judgment. Specifically, petitioner alleged that a settlement conference had been held on September 17, 1998, and remainder beneficiaries "were directed to come forward with a statement of the issues which they contend are material, disputed fact questions unrelated to prudence issues." However, there is no order contained in the lower court record that

evidenced a court ruling or directive to that effect.[1] Consequently, the pleadings alleged that petitioner was "powerless to move this case toward final resolution" without the pleading from remainder beneficiaries. In response to the motion, remainder beneficiaries filed a pleading identifying various factual issues that were to be tried before a jury pursuant to the Supreme Court decision. There is no indication in the lower court record that the lower court ever ruled on this motion.

On April 19, 1999, petitioner filed a second motion entitled motion for entry of judgment. However, this motion should have been characterized as a motion for summary disposition. Essentially, petitioner argued that there were no remaining genuine issues of material fact and the entire case addressed and challenged the prudence of petitioner. Petitioner's brief in support of the motion was accompanied by a bound appendix of exhibits that included testimony from the trial. In response, remainder beneficiaries argued that there were multiple questions of fact regarding good faith and ordinary diligence involving conflict of interest, adequacy of price, accounting, and retention of trust proceeds without court authorization. The probate court, after remand, did not comply with the Supreme Court decision. In lieu of determining whether jury submissible issues were presented outside of the prudence claim, the probate court merely adopted the findings of the prior trial judge and concluded that he did not err. The probate court granted petitioner's motion for summary disposition, albeit entitled a motion for entry of judgment.

Appellate review of the grant or denial of a motion for summary disposition is de novo. *The Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), the affidavits, pleadings, depositions, admissions and documentary evidence then filed in the action or submitted by the parties must be considered.[2] MCR 2.116(G)(5). Once the motion is made and supported, the adverse party has an obligation to demonstrate, with documentary evidence, that a genuine issue for trial has been presented. MCR 2.116(G)(4). In *SSC Associates Limited Partnership v General Retirement System*, 192 Mich App 360, 363-365; 480 NW2d 275 (1991), this Court noted the burden of each party with respect to a motion for summary disposition pursuant to MCR 2.116(C)(10):

> The trial court adopted the expert's opinion, submitted in letter form, determined that there was no genuine issue of a material fact, and granted plaintiff summary disposition under MCR 2.116(C)(10). We hold that this was error.

[1] We note that the lower court record on appeal is incomplete. Specifically, the transcript of the bench trial has not been provided for our review. Both parties in this instance have filed claims of appeal and were obligated, as appellants, to ensure that the full record was provided on appeal. *Band v Livonia Associates*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). The deficiency has hampered our ability to review this matter as will be explained further in this opinion.

[2] Petitioner did not entitle its motion as requesting summary disposition and did not identify the subsection of this court rule under which summary disposition was requested. However, we can infer from the pleadings and appendices submitted with the brief that petitioner alleged that there was no issue regarding any material fact and judgment should be entered in its favor. Petitioner sought to invoke MCR 2.116(C)(10) without expressly identifying the rule.

A motion for summary disposition brought under MCR 2.116(C)(10), based on the lack of a genuine issue of material fact, tests whether there is factual support for the claim.

Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion must be filed with the motion. MCR 2.116(G)(3). The affidavits must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion. *Durant v Stahlin*, 375 Mich 628; 135 NW2d 392 (1965). They do not resolve issues of fact. Their purpose is to help the court determine whether an issue of fact exists. *Id*. at 640, 645-647. Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence. *Remes v Duby (After Remand)*, 87 Mich App 534, 537; 274 NW2d 64 (1978).

The party opposing the motion must then come forward with a showing that there is truly a dispute. *Hollowell v Career Decisions, Inc*, 100 Mich App 561; 298 NW2d 915 (1980). However, the party opposing a motion for summary disposition has no obligation to submit any affidavit until the moving party submits a proper affidavit regarding a dispositive fact. *Bobier v Norman*, 138 Mich App 819; 360 NW2d 313 (1984). In ruling on the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 118; 421 NW2d 592 (1988). Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. *Weeks v Bd of Trustees, Detroit General Retirement System*, 160 Mich App 81, 84; 408 NW2d 109 (1987). A reviewing court should be liberal in finding that a genuine issue of material fact exists. *Rizzo v Kretschmer*, 389 Mich 363, 372; 207 NW2d 316 (1973). A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. *Id*. at 371.

It is well settled that where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted. *Metropolitan Life Ins, supra*; *Brown v Pointer*, 390 Mich 346, 354; 212 NW2d 201 (1973); *Crossley v Allstate Ins Co*, 139 Mich App 464, 468; 362 NW2d 760 (1984).

The trial court must not usurp a trial jury's right, nor anticipate its own right as the trial factfinder if such it may become late, to determine the affiant's credibility. *Durant, supra* at 647-652. Moreover, summary disposition is especially suspect where motive and intent are at issue, or where the credibility of a witness or deponent is crucial. *Crossley, supra*.

Applying the above stated rules to the present case reveals that the trial court did not determine whether a genuine issue regarding any material fact existed that did not pertain to the prudence issue. For example in addressing the conflict of interest question, the probate court stated:

> On the conflict of interest issue, again, the question – and the cases have been cited about whether or not it's a fact question that there's a conflict of interest, and that a duty, therefore, arises on the part of the – of the bank because of that conflict. All of that was revealed in the testimony – the extensive testimony before Judge DeYoung.
>
> It seems to me that this is, again, an attempt to get a different result from the same trial court. And, in effect, get this judge to overrule the prior judge's ruling on that matter. And I – I think it's correct that I do not have the ability or the authority to do that. That this is not a fact, but rather is a conclusion based on the information which is undisputed. It is undi [sic] – it was laid out in all of the pleadings and the testimony that the bank had a banking commercial relationship with this corporation as well as a trust relationship with these beneficiaries and their father – and their grandfather.

The Supreme Court concluded that the remainder beneficiaries were entitled to a jury trial addressing any factual matters relating to prudence. *In re Messer Trust, supra*. Thus, the issue was not whether the successor trial judge had the ability to overrule the prior factual determinations in the prior trial. Rather, the issue, that was never reached by the successor judge, was whether the issue of conflict of interest fell outside the realm of the prudence issue. If the conflict of interest issue was outside the scope of prudence, then remainder beneficiaries were entitled to a jury trial on the matter if there were genuine issues of material fact. *In re Messer Trust, supra*. Furthermore, the probate court stated that the conflict of interest issue did not present "a fact, but rather is a conclusion based on the information presented which is undisputed." While we do not have the complete record on appeal, it appears that the statement is erroneous. The fact that petitioner had a relationship with the company to which the shares were sold was undisputed. However, whether that relationship had any bearing on the treatment of trust involving remainder beneficiaries seemingly presented a credibility issue that was for resolution by the trier of fact.[3]

Additionally, the probate court made the following general statement:

> So for all of those reasons, I cannot find that there are factual issues that have not been plumbed thoroughly. And that the – the remaining so-called factual issues, are really not factual issues at all but conclusions, based on openly stipulated facts. I cannot imagine that a jury would be able to elucidate the situation any further because nobody's disagreeing with the underlying facts.

---

[3] We are unable to hold that this issue presents a question of fact for the jury because of the limited record. Furthermore, we address issues that are raised and addressed by the lower court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).

Again, while we do not have the full record on appeal, the pleadings indicate that even where facts were undisputed, the construction of the facts and the assessment of credibility of witnesses was crucial. For example, while one could conclude that it is arguably prudent to have a diverse portfolio, remainder beneficiaries seemingly argued that a conflict of interest by petitioner resulted in an inadequate price for the sale of the stock. The Supreme Court held that fact issues outside the realm of prudence were to be submitted to a jury. *In re Messer Trust, supra*. It is not for the trial court to imagine or speculate whether a jury would reach a different conclusion than the prior trial judge. Rather, the right to a trial by jury is provided for in the Michigan Constitution. Const 1963, art. 1, § 14. ("The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree."). Furthermore, the Constitution of 1963, Art. 6, § 5 affords the Supreme Court rule making authority. MCR 2.508(A) provides "[t]he right of trial by jury as declared by the constitution must be preserved to the parties inviolate." Accordingly, the issues following the Supreme Court decision continue to be whether the allegations characterized as good faith and due diligence, including but not limited to, breach of fiduciary duties involving conflict of interest, adequacy of price, accounting, and retention of trust proceeds without court authorization fall outside the realm of prudence. Once that decision is reached, the trial court is required to provide remainder beneficiaries their right to a jury trial, regardless of the opinion of the prior conclusion and findings by the prior trial court, if there are genuine issues of material fact. The determination regarding genuine issues of material fact must be made based on available documentary evidence and where evidence is contingent upon credibility issues, summary disposition may not be granted. *SSC, supra*. Accordingly, we reverse and remand for consideration of these issues.

We also note that petitioner is correct in its assertion on cross appeal that the trial court erroneously failed to make any inquiry regarding the reasonableness of attorney fees. *In re Krueger Estate*, 176 Mich App 241, 248; 438 NW2d 898 (1989). However, in view of our decision to reverse and remand, this matter will depend on the resolution of the issues on remand.

Reversed and remanded to the probate court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Harold Hood
/s/ Mark J. Cavanagh